Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

STATE OF NEW YORK *EX REL.*
ATTORNEY GENERAL ELIOT SPITZER, *ET AL.*,

PETITIONERS,

V.

MICROSOFT CORPORATION,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the district court's findings of fact and conclusion of law that Microsoft had violated Section 2 of the Sherman Act by illegally maintaining its monopoly in PC operating systems be upheld?

2. Should the district court's findings of fact and conclusion of law that Microsoft had violated Section 2 of the Sherman Act by attempting to monopolize the market for Internet browsers be upheld?

3. Should the district court's findings of fact and conclusion of law that Microsoft had violated Section 1 of the Sherman Act by tying its Internet browser to its operating system products be upheld?

4. Should the district court's award of remedial injunctive relief be upheld?

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The States of California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, Utah, West Virginia and Wisconsin, as well as the District of Columbia (hereinafter the "States") respectfully petition for a writ of certiorari before judgment to review the Final Judgment of the United States District Court for the District of Columbia that was rendered in the above-entitled case as well as in *United States v. Microsoft Corp.*

Microsoft filed one Jurisdictional Statement for the appeals from the Final Judgment in both cases. Simultaneously herewith, the States are filing a response to Microsoft's Jurisdictional Statement, stating that their case is now properly before this Court pursuant to the Expediting Act. As a precautionary measure to provide an alternative basis for the exercise of jurisdiction by the Court in this appeal, the States also hereby petition for a writ of certiorari before judgment by the court of appeals.

OPINION BELOW

The district court's Findings of Fact, Conclusions of Law, and Final Judgment in this proceeding are reported, respectively, at 84 F. Supp. 2d 9 (D. D.C. 1999) (A46-A246), 87 F. Supp. 2d 30 (D. D.C. 2000) (A1-A43), and 97 F. Supp. 2d 59 (D. D.C. 2000) (A253-A279).[1]

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1. All of the relevant portions of the record are contained in the appendix to Microsoft's Jurisdictional Statement. Accordingly, the States are not filing a separate appendix with this petition, and all references herein are to the Appendix to Microsoft's Jurisdictional Statement.

STATEMENT OF JURISDICTION

As set forth in the States' brief in response to Microsoft's Jurisdictional Statement, this Court should exercise jurisdiction under the Expediting Act to review directly the appeals in the States' and the United States' actions against Microsoft. Nevertheless, as a precautionary measure, the States hereby invoke this Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(e) as an alternative basis for this Court's direct review of the appeal in their case.

Under 28 U.S.C. § 1254(1), the Court may grant a petition for a writ of certiorari to review any case that is "in" the court of appeals, even if a final judgment has not yet been entered by the court. *See United States v. Nixon*, 418 U.S. 683, 692 (1974); *id.* at 686-87 (reviewing claims "because of the public importance of the issues presented and the need for their prompt resolution"). *Even the party that prevailed in the district court* (as the States did) may seek review on a petition for a writ of certiorari before judgment. *See id.* at 686-87, 690.

Under 28 U.S.C. § 2101(e), a petition for a writ of certiorari before judgment is timely filed "at any time before judgment" in the court of appeals. Because a notice of appeal has been filed by Microsoft in the States' case and that case has been docketed in the court of appeals, invocation of 28 U.S.C. § 1254(1) is proper. *See Nixon*, 418 U.S. at 692; *Gay v. Ruff*, 292 U.S. 25, 30-31 (1934); *Dames & Moore v. Regan*, 453 U.S. 654, 667-68 (1981); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 2.3, at 42 (6th ed. 1986).

STATUTORY PROVISIONS INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 — and the state-law analogues to those federal provisions — are set forth at p. 1 of Microsoft's Jurisdictional Statement.

The Expediting Act, 15 U.S.C. § 29, states:

> (a) Court of appeals; review by Supreme Court. Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in such an action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

> (b) Direct appeals to Supreme Court. An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a).

28 U.S.C. § 1254(1) provides that cases in the courts of appeals may be reviewed by this Court as follows:

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree[.]

28 U.S.C. § 2101(e) provides:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

STATEMENT OF THE CASE

The States adopt and incorporate herein the statements contained in their brief and that of the United States in response to Microsoft's Jurisdictional Statement.

REASONS FOR GRANTING THE WRIT

A petition for a writ of certiorari before judgment in a case pending in a court of appeals will be granted under 28 U.S.C. §§ 1254(1) or 2101(e) "upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. Rule 11.

This Court on several occasions has issued a writ of certiorari before judgment in situations where immediate Supreme Court review was necessary to resolve expeditiously questions of exceptional and wide-ranging public importance. For example, the Court issued a writ of certiorari before judgment in *Mistretta v. United States*, 488 U.S. 361, 371 (1989) ("imperative public importance" and "disarray among the Federal District Courts" over constitutionality of sentencing guidelines statute), and *Dames & Moore*, 453 U.S. at 668 (issues arising out of presidential actions to secure release of hostages held by Iran "are of great significance and demand prompt resolution").

See also Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259 (discussing cases and standards applied).

The validity of the Final Judgment is one of the most pressing and important public questions under the antitrust laws to come before this Court since the amendment of the Expediting Act in 1974. *See* States' Response to Microsoft's Jurisdictional Statement ("States' Response"), at 5-6. Because the Final Judgment is subject to direct review by this Court pursuant to the Expediting Act, a writ of certiorari before judgment is warranted in aid of this Court's jurisdiction to review the Final Judgment under that Act. In such circumstances, granting direct review in the States' case would not constitute a "deviation" from normal appellate practice (*see* Sup. Ct. Rule 11 (stating that certiorari before judgment may be granted "upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice")), because treating fully consolidated cases as a single proceeding on appeal is normal appellate practice.

I. Certiorari Before Judgment Is Appropriate In Aid Of The Court's Jurisdiction Under The Expediting Act.

This Court has recognized that exercise of its power to grant certiorari before judgment in the court of appeals is particularly appropriate where a similar or identical question is already before the Court in another case, and granting certiorari would therefore aid the Court in its direct review or resolution of that pending case. For example, in *Brown v. Board of Education*, 344 U.S. 1 (1952), the Court took

judicial notice of *Bolling v. Sharpe* then pending in the court of appeals, and invited the filing of a petition for certiorari before judgment in *Bolling* in order to consider issues similar to those in other cases pending in the Court. *See Brown*, 344 U.S. at 3. The Court subsequently granted certiorari before judgment in *Bolling*, 344 U.S. 873 (1952), after such a petition was filed. Similarly, in *Reid v. Covert*, 354 U.S. 1 (1957), where one of two related cases had been brought before the Court by direct appeal pursuant to 28 U.S.C. § 1252, the Court granted a petition for certiorari before judgment in another case raising the same issue, which petition was filed by the United States after prevailing in the district court. *See Reid*, 354 U.S. at 5.

In particular, the Court has recognized that certiorari before judgment is warranted where, as here, the *very same judgment* as to which direct review is sought is already before the Court on direct review of another case, so that consolidation of the related appeals in this Court offers the only way to resolve the entire judgment. This principle is so compelling that the Court has granted direct review of related aspects of the same judgment *even absent* the filing of a petition for certiorari before judgment or other express jurisdictional predicate. Thus, for example, in *Clinton v. New York*, 524 U.S. 417 (1998), the Court determined that it had authority under 2 U.S.C. § 692 — which allowed expedited review of claims brought by "any member of Congress or any individual adversely affected" by the Line Item Veto Act — to review directly two consolidated cases invalidating the Act. *See id.* at 428-29 & n.14. In a partial concurrence, Justice Scalia disagreed with the majority that the plaintiffs in one of those cases came within the scope of 2 U.S.C. § 692, but concluded that under the circumstances, direct review would have been warranted in any event pursuant to

a writ of certiorari before judgment if one had been filed "[i]n light of the . . . little sense it would make for the Government to pursue its appeal against one appellee in this Court and against the others in the Court of Appeals[.]" *Id.* at 455 (Scalia, J., concurring in part and dissenting in part). Similarly, in *Roe v. Wade*, 410 U.S. 113 (1973), although the defendant was entitled to appeal directly only the denial of injunctive relief under 28 U.S.C. § 1253, the Court nevertheless reviewed the grant of declaratory relief because the arguments being raised were "necessarily identical." In so doing, the Court noted that "[i]t might have been preferable if the defendant . . . had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief." *Id.* at 123.

If this Court were to accept review of the Final Judgment in the United States' case pursuant to the Expediting Act but deny review of the appeal in the States' case to await developments in the court of appeals, the result would be a substantial delay in the ultimate resolution, and the risk of inconsistent disposition, of issues that are of the utmost public importance. Grant of the petition before judgment would be proper and indeed critical in aid of the Court's jurisdiction to review the Final Judgment under the Expediting Act. That Act was enacted to ensure that judgments in actions in which the United States is the complainant are quickly and finally resolved. *See* States' Response at 7-8. Such resolution would be frustrated if the merits of that judgment were also reviewed in a separate proceeding in the court of appeals.

II. Granting Direct Review In The States' Case Is Consistent With The "Normal Appellate Practice" Of Treating Cases Consolidated For Purposes Of Trial And Judgment In The District Court As A Single Proceeding On Appeal.

If the Court accepts jurisdiction to review the Final Judgment under the Expediting Act, granting certiorari in the States' case would be consistent with the Court's practice of ensuring that an entire consolidated proceeding is before it on direct review, and with the general federal practice of treating cases that have been completely consolidated below as a single proceeding on appeal. *See* States' Response at 11-12 (discussing consolidation cases and Sup. Ct. Rule 18.2, which provides that once a direct appeal from a district court judgment is filed under a direct review statute such as the Expediting Act, "[a]ll parties to the proceeding in the district court are deemed parties entitled to file documents in this Court"). These judicial practices recognize the fundamental principle that where, as here, there is one underlying controversy — not two — a court must generally have the whole controversy pending before it in order for its adjudication to be efficient and effective.

Microsoft has not shown why this Court should deviate in this proceeding from the normal appellate practice with respect to fully consolidated cases. Indeed, it acknowledges that the practical result of this Court reviewing the United States' case but not the States' case would be highly undesirable, in that having the "two appeals . . . proceed in separate courts" would "delay[] ultimate resolution of the two cases." Microsoft Juris. Statement at 28. *See also* States' Response at 9-10 (responding to Microsoft's argument that such delay is actually a reason for this Court not to hear *either* of Microsoft's appeals).

Moreover, Microsoft has not suggested, let alone demonstrated, that its interests would be unfairly undermined by direct review of the States' case as an aid to review of the Final Judgment in the United States' case under the Expediting Act. Indeed, Microsoft's acknowledgment that a two-tracked appeal would delay "ultimate resolution of the two cases" confirms that the legitimate interests of all parties would be furthered by this Court's consideration of both consolidated cases, should it decide to accept the United States' case. In light of the public interest in judicial economy and finality of resolution that would be injured by piecemeal appeals, it is appropriate for this Court to resolve the entire Final Judgment now.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari before judgment in the States' case in aid of its jurisdiction to review the Final Judgment pursuant to the Expediting Act.

Respectfully submitted,

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